

NO. 44886-6

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DENNIS DEPOE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Larkin

No. 12-1-03546-8

Response Brief

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the State have jurisdiction to prosecute the charge of making a false statement to a public servant under RCW 37.12.010?

B. STATEMENT OF THE CASE.

1. Procedure

On September 19, 2012, the State charged Dennis Depoe, hereinafter referred to as "Defendant," with felony driving under the influence, making a false or misleading statement to a public servant, driving while license suspended in the first degree, and failure to have an ignition interlock device. CP 1-3; RCW 46.61.502; RCW 9A.76.175; RCW 46.20.342(1)(a); RCW 46.20.070.

On April 17, 2013, Defendant moved to dismiss based on lack of subject matter jurisdiction. 4/17/13 RP 23-24. The Honorable Linda Lee denied the motion. 4/17/13 RP 23-24. Defendant's jury trial, held before the Honorable Thomas Larkin, began on April 22, 2012. 4/22/13 RP 82.

At trial, Defendant moved to dismiss based on insufficient evidence and renewed his motion regarding lack of subject matter jurisdiction. 4/22/13 RP 74; 4/23/13 RP 203. The Honorable Judge Larkin again denied his motions. 4/22/13 RP 78. Defendant was found guilty as

charged. 4/25/13 RP 263. The court imposed a sentence of 60 months in confinement. CP 41-56.

Defendant timely filed a Notice of Appeal on May 17, 2013. CP 38.

2. Facts

On September 18, 2012, at approximately 2:30 a.m., Officer Ryan Sales, of the Puyallup Tribal Police Department, responded to the Emerald Queen Casino to investigate a person suspected of driving under the influence. 4/23/13 RP 95. At the casino parking lot, Officer Sales found the reported vehicle high centered on the parking lot curb and partially driven into a fence. 4/23/13 RP 147.

Officer Sales also saw Defendant walking away from the driver's side of the vehicle. 4/23/13 RP 95-97. Defendant denied that the vehicle belonged to him, stating that "No, it's not. That's not my vehicle. It belongs to a white female -- white male who had just walked away from it." 4/23/13 RP 98. Defendant also denied having any forms of identification on him. 4/23/13 RP 99. He even gave Officer Sales the false name "Desman Depoe," insisting that it was correct despite the fact that no results appeared on the records check. 4/23/13 RP 102, 148. Officer Sales identified Defendant by finding Defendant's court documents in a backpack, which Defendant also denied as being his, by the vehicle. 4/23/13 RP 99, 101-103.

Officer Sales learned that Defendant had several warrants after running a record check of Defendant's true information. 4/23/13 RP 104. Officer Sales learned that Defendant's license was suspended, and that he was driving without an ignition interlock device. 4/23/13 RP 104. Officer Sales also suspected that Defendant was intoxicated, so Corporal Scrivner of the Puyallup Tribal Police who was trained in DUIs, was called in to investigate. 4/23/13 RP 105-106, 108 143-144. Corporal Scrivner was trained to conduct standardized field sobriety tests. 4/23/13 RP 145.

Based on his training and experience, Corporal Scrivner believed Defendant was intoxicated due to his appearance¹. 4/23/13 RP 151, 154-156. Corporal Scrivner and Officer Sales confirmed that Defendant was in fact driving by reviewing the surveillance footage from the Emerald Queen Casino. 4/23/13 RP 108-109, 153-154. Defendant was arrested for driving under the influence, driving while license suspended, and failure to have an ignition interlock device. 4/23/13 RP 156.

During pre-trial hearings, Defendant moved to dismiss based on lack of subject matter jurisdiction because he is an enrolled member of the Sauk-Suiattle tribe and the crime occurred on the Puyallup Reservation. CP 6-20; 4/17/13 RP 2. The court dismissed the motion, finding that the

¹ Defendant exhibited multiple signs consistent with intoxication: bloodshot eyes, drooping eyelids, relaxed musculature and facial features, slow and deliberate movements, slurred speech, and inability to walk in a straight line. 4/23/13 RP 151. Defendant also declined to perform the standardized field sobriety tests. 4/23/13 RP 153.

State had subject matter jurisdiction to prosecute Defendant pursuant to RCW 37.12.010, because Defendant entered the parking lot from a public road.² 4/16/13 RP 23.

At trial, Defendant renewed his motion to dismiss the false statement charge for lack of subject matter jurisdiction. 4/22/13 RP 74. The State responded that making a false statement related to the operation of a motor vehicle was directly related to the DUI investigation. 4/22/13 RP 75-76. The court took the motion under advisement and proceeded with trial stating that, "[the State's argument] seems compelling to be, the common sense side of it. It just wouldn't make any sense otherwise." 4/22/13 RP 78. The court later denied Defendant's motion stating that, "Okay. Well, I looked. I couldn't find anything one way or another myself, so I'm going to go with what my first inclination was, that it merges together in one. Okay. So that takes care of that." 4/23/13 RP 203.

² RCW 37.12.010 gives the State jurisdiction over tribal members on property within a reservation for "[o]peration of motor vehicles upon the public streets, alleys, roads and highways."

C. ARGUMENT.

1. THE STATE LACKED JURISDICTION TO PROSECUTE DEFENDANT FOR MAKING A FALSE STATEMENT TO A PUBLIC SERVANT UNDER RCW 37.12.010 WHEN THE CRIME DOES NOT FALL WITHIN THE PROVISION OF OPERATING A MOTOR VEHICLE.

Generally, the superior court has original jurisdiction in all criminal felony cases and in all proceedings in which jurisdiction has not been vested exclusively in some other court. Wash. Const., art IV, § 6. The federal courts have exclusive jurisdiction to try an enrolled Native American for the alleged commission of most major crimes in "Indian Country." See *White v. Schneckloth*, 56 Wn.2d 173, 174, 351 P.2d 919 (1960) (federal courts have exclusive jurisdiction to try tribal members of a crime enumerated in the Ten Major Crimes Act, 18 U.S.C. § 1153). Unlike crimes committed off-reservation, the State does not have exclusive jurisdiction over crimes by Indians occurring on their reservations. *State v. Clark*, 178 Wn.2d 19, 308 P.3d 590 (2013).

Washington's statutory authority over reservation lands derives from a federal delegation of jurisdiction. Pub. L. No. 83-280, 67 Stat. 588 (1953); *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 470-471, 99 S. Ct. 740, 58 L.Ed.2d 740 (1979).

In 1953, Congress enacted federal legislation authorizing states to impose concurrent state jurisdiction in Indian country with or without tribal consent. Public Law 280, Pub. L. No. 85-280, 67 Stat. 588 (1953). The Washington Legislature, however, elected to extend civil and criminal jurisdiction only to those reservations requesting that it do so. Ch. 37.12 RCW; *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 471-472, 99 S. Ct. 740, 58 L.Ed.2d 740 (1979); *see Cross v. Comm'r of Internal Revenue*, 126 Wn.2d 43, 46-49, 891 P.2d 26 (1995) (discussing the history of Public Law 280).

In 1963, the Washington Legislature extended its jurisdiction, without tribal consent, to include state criminal and civil jurisdiction over all non-Indians in Indian country, Indians on fee-patented land on reservations, and Indians on tribally-owned or individually allotted lands held in trust by the federal government. RCW 37.12.010; *Quinalt Tribe*, 368 F.2d at 651-652; *State v. Sohapp*, 110 Wn.2d 907, 909, 757 P.2d 509 (1988). The legislature did not assert general jurisdiction but set forth eight categories of cases over which it would assert jurisdiction. RCW 37.12.010(1)-(8); *Maxa v. Yakima Petroleum, Inc.* 83 Wn. App. 763, 924 P.2d 372 (1996) *review denied* 131 Wn.2d 1016, 936 P.2d 416 (1997).

These excepted categories include:

1. Compulsory school attendance;
2. Public Assistance;
3. Domestic Relations;
4. Mental Illness;

5. Juvenile Delinquency;
6. Adoption proceedings;
7. Dependent children; and
8. Operation of motor vehicles on the public streets, alleys, roads, and highways.

RCW 37.12.010.³

Defendant only challenges the assertion of jurisdiction over the "Operation of motor vehicles upon the public streets, alleys, roads and highways." RCW 37.12.010(8); *see* Brief of Appellant at 8.⁴

As a general rule, "[s]tate courts have no jurisdiction [over victimless crimes committed by Indians], absent assumption under Public Law 280 or other special jurisdictional legislation." American Indian Law Deskbook, 161, (Larry Long, ed. University Press of Colorado, 2008). However, Washington has validly asserted jurisdiction over criminal driving offenses falling within the purview of RCW 37.12.010(8). *State v. Abrahamson*, 157 Wn. App. 672, 238 P.3d 533 (2010) (attempting to elude, driving while under the influence, and driving while license revoked in the first degree; *State v. Pink*, 144 Wn. App. 945, 955-956, 185 P.3d 634 (2008) (a passenger's unlawful possession of a firearm did not

³ The United States Supreme Court held that RCW 37.12.010 is constitutional and complies with Public Law 280. *Yakima Nation*, 439 U.S. at 473-474, 99 S. Ct. 740.

⁴ Public Law 280 did not bar the criminal prosecution of Defendant's unchallenged crimes: driving while license suspended, driving without an ignition interlock device, and felony driving under the influence, as those crimes have been recognized as falling within the purview of RCW 37.12.010. *See Yallup*, 160 Wn. App. at 509.

constitute a driving offense). Washington's implied consent statute falls within the criminal jurisdiction of RCW 37.12.010(8). *State v. Yallup*, 160 Wn. App. 500, 509, 248 P.3d 1095 (2011).

When the situs of the crime is undisputed, the determination of whether the trial court had personal jurisdiction over a charge is a question of law that is reviewed *de novo*. *State v. Squally*, 132 Wn.2d 333, 340-341, 937 P.2d 1069 (1997) (citing *Lewis v. Bours*, 119 Wn.2d 667, 669, 835 P.2d 221 (1992); *Joy v. Kaiser Aluminum & Chem. Corp.*, 62 Wn. App. 909, 911, 816 P.2d 90 (1991); *see also State v. Boyd*, 109 Wn. App. 244, 34 P.3d 912 (2001) *review denied* 146 Wn.2d 1012, 51 P.3d 86 (2002).

In *State v. Pink*, 144 Wn. App. 945, 185 P.3d 634 (2008), defendant, a tribal member of the Quinault Tribe, was charged with unlawful possession of a firearm discovered in a car during a traffic stop on a state highway running through the Quinault Indian reservation. *Id.* at 947-948. The charges were dismissed because the State lacked authority to prosecute the crime since it did not involve the operation of a motor vehicle on a public highway under RCW 37.12.010(8). *Id.* at 949.

In the instant case, the State agrees that the court lacked subject matter jurisdiction to prosecute Defendant for the crime of making a false statement to a public servant. The evidence showed that Defendant is a member of the Sauk-Suiattle tribe. CP 6-20; 4/16/12 RP 9-10, 4/23/13 RP 96. There was also evidence that the crime occurred on the Puyallup

Reservation. CP 6-20; 4/16/13 RP 9-10, 4/23/13 RP 96. Generally speaking, tribes have exclusive jurisdiction over both tribal members and members of other tribes on the reservation where the violation occurs. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011 (1978). Similar to *Pink*, Defendant's false statement charge did not concern the operation of a motor vehicle. RCW 37.12.010(8) specifically provides for the State's assumption of jurisdiction over tribal members on reservations for matters involving the "[o]peration of motor vehicles upon the public streets, alleys, roads and highways." However, Defendant was not operating a motor vehicle when he made the false statement to Officer Sales. There is no legal authority to suggest that making a false statement to a public servant falls within the provisions provided in RCW 37.12.010. As such, the proper remedy is to dismiss without prejudice, the charge of making a false statement to a public servant. *See Pink*, 144 Wn. App. at 949; *State v. Cooper*, 81 Wn. App. 36, 912 P.2d 1075 (1996).

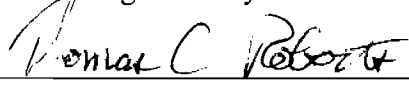
D. CONCLUSION.

The State lacked subject matter jurisdiction to prosecute Defendant for making a false statement to a public servant when the crime did not relate to the operation of a motor vehicle pursuant to RCW 37.12.010. As

such, this Court should dismiss without prejudice the charge of making a false statement a public servant.

DATED: January 27, 2014.

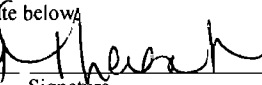
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The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below:

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